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Rapanos ruling muddies waters

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LOS ANGELES TIMES and THE SAGINAW NEWS

Attorneys say a U.S. Supreme Court ruling this week designed to clear up wetland issues for a Midland developer has only muddied the waters.

This case was supposed to define wetlands under the protection of federal environmental laws. But advocates on both sides described the ruling involving John A. Rapanos as "murky."

The ruling put Rapanos' 18-year attempt to build on three parcels in Midland and Bay counties on hold. The high court sent the case back to the lower courts, where a judge will decide whether Rapanos' fields are indeed protected wetlands and immune from development.

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The Clean Water Act is designed to protect the "waters of the United States" from pollution, four justices and the Bush administration said. So if even one drop of water can flow from a wetland to a river or lake, the government can regulate the wetland – even if it is many miles inland.

Four others on the court said that thinking went way too far. That would include "puddles, storm drains and roadside ditches," they said.

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Under this one-drop-of-water theory, the roof of the Supreme Court would fit the wetland definition, one lawyer observed in a brief filed in the case, because rainwater can flow from its gutters to the Potomac River.

Justice Antonin Scalia said a wetland must be a "continuously flowing body of water" that is part of a river or lake system. That definition would end federal protection of tens of millions of acres of wetlands – including nearly all those in the West, because they are dry for much of the year.

The third answer was supplied by Justice Anthony M. Kennedy, a California native. The court's centrist justice, Kennedy sought a position that would protect most wetlands but not mud puddles and drainage ditches.

He said a wetland must have a "substantial" connection to a navigable river or lake, even if water flows only a few days a year. If filling the wetland would "significantly affect the chemical, physical or biological integrity" of the downstream waters, then it can come under protection, he said.

But who could know which wetlands, if filled, would cause a significant impact downstream? Kennedy said the Army Corps of Engineers must decide this "on case-by-case basis," and it may not point to "speculative" effects.

Many legal experts who read the court's opinion – 100 pages in all – admitted they could not say for sure who won.

They could agree, however, that it means more litigation.

"Clearly, the court is not speaking with one voice," said Joan Mulhern, a lawyer for Earthjustice.

To add to the confusion, Scalia delivered his opinion first Monday, as though he were speaking for the court. Technically, five justices, including Kennedy, had voted to overturn the lower court ruling against Michigan developer Rapanos.

But it soon became clear that Scalia's strong opinion cutting back on the reach of the Clean Water Act did not, in fact, speak for majority. v

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